FOR ARGUMENT

(p)

No. 88-2041

In The

Supreme Court of the United States

October Term, 1989

IN THE MATTER OF:
THE COMPLAINT OF EVERETT A. SISSON, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,

EVERETT A. SISSON,

Petitioner,

v.

BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF ON THE MERITS BY RESPONDENTS BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants

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Of Counsel:

JEFFREY S. HERDEN
LANDAU, OMAHANA & KOPKA
8420 W. Bryn Mawr Avenue
Suite 1030
Chicago, Illinois 60631
(312) 380-8800

ROBERT J. KOPKA
LANDAU, OMAHANA & KOPKA
8420 W. Bryn Mawr Avenue
Suite 1030
Chicago, Illinois 60631
(312) 380-8800

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QUESTIONS PRESENTED

1. Whether a fire on board a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity in order to bring it within the admiralty and maritime jurisdiction of the District Court pursuant to 28 U.S.C. §1333 and Article III, §2, of the United States Constitution.

2. Whether a federal court may assert admiralty jurisdiction over a limitation of liability action when the underlying tort fails to qualify as maritime because it is unconnected to traditional maritime activity.

3. Whether this Court should reconsider its decision in *Richardson v. Harmon*, 222 U.S. 96 (1911).

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Everett A. Sisson, as owner of the motor yacht, the M/V ULTORIAN, and the Respondents, Burton B. Ruby, Fireman's Fund Insurance Company*, Port Authority of Michigan City, Joseph T. Charles, Cincinnati Insurance Company, Continental Insurance Company, John P. Walter and Roger Dillon as claimants in the limitation proceeding.

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* Fireman's Fund Insurance Company's parent corporation is The Fund American Companies, Inc. All of its subsidiaries are wholly owned.

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STATEMENT OF THE CASE

The Appellant's Statement of the Case contains the following omissions or mistatements of material facts:

Although there has been no judicial determination of the cause of the fire which erupted in the area of the washer/dryer unit on board Petitioner's yacht, Petitioner has alleged that the fire was caused by a defective washer/dryer unit. J.A., 1a-2a; J.A., 25a; J.A., 37a. Petitioner's Statement of the Case identifies three enumerated possible causes of ignition, but these are not based upon evidence in the record. There is also evidence that the fire was caused by Sisson's negligence. *Sisson v. Hatteras, et al.*, 1989 A.M.C. 2846, 2851 (N.D. Ill. 1989).

The alleged value of the M/V ULTORIAN after the fire is $800.00 and Petitioner seeks to limit his liability to $800.00.

SUMMARY OF ARGUMENT

The Seventh Circuit properly affirmed dismissal of Sisson's Petition for Exoneration or Limitation of Liability based on lack of federal subject matter jurisdiction. This case involves a fire which erupted at a washer/dryer unit aboard a pleasure yacht. The fire spread to other pleasure boats and a marina which harbored only pleasure boats. Therefore, this non-maritime tort did not involve commerce, commercial vessels or navigation.

The Seventh Circuit's ruling properly balances the federal interest in maritime commerce while preserving

to the states jurisdiction over non-maritime, non-commercial torts which would not potentially disrupt maritime commerce. Such a balance is particularly necessary because the proliferation of pleasure boats upon the navigable waterways has resulted in an increase in the number and assortment of "garden variety" tort claims which do not impact any federal interest and are more properly reserved to the states. The constitutional mandate, granting admiralty and maritime jurisdiction to federal courts, is based upon the federal concern over maritime commerce and the federal expertise over maritime navigation. When a tort which occurs on navigable water does not involve commerce or navigation and would not potentially disrupt maritime commerce, the federal courts lack subject matter jurisdiction.

The Seventh Circuit's opinion permits sufficient flexibility to evolve a case-specific precedent which focuses upon commerce without unduly restricting a federal district court from assuming federal jurisdiction where mandated. The Petitioner urges a rigid test which involves the application of admiralty jurisdiction to non-commercial, non-maritime torts when the tort fortuitously occurs upon a vessel. Such a rule would burden the federal courts and produce an inequitable result. The Seventh Circuit's opinion is consistent with the prior rulings of this Court, limiting federal admiralty jurisdiction to torts involving traditional maritime activities and therefore, it should be affirmed.

The Limitation of Liability Act does not confer independent federal jurisdiction. The Act was adopted for the sole purpose of promoting maritime commerce and its

application to non-commercial, non-maritime torts is neither authorized by the Act nor contemplated by its framers. Jurisdiction under the Act is co-extensive with general federal admiralty jurisdiction.

Richardson v. Harmon, 222 U.S. 96 (1911) should be reconsidered. Respondent believes that the *Richardson* case merely expands the scope of the Limitation of Liability Act to include damage to a non-maritime structure. Since this rule was codified in the Extension of Admiralty Act, the *Richardson* decision is without precedential value. Jurisdiction under the Act is still co-extensive with general admiralty jurisdiction and *Richardson* does not permit a separate "species" of federal admiralty jurisdiction under the Act.

However, if this Court interprets *Richardson* to permit jurisdiction under the Act even where the criteria for admiralty jurisdiction are otherwise lacking, then *Richardson* should be reconsidered in light of the changes in modern society and the purpose of the Limitation of Liability Act. The Act was passed to encourage an American merchant marine at a time when non-maritime torts were unforeseeable. Permitting pleasure boaters to limit their liability for "garden variety" torts subverts the intent of the Act and the reach of state tort law, producing an inequitable result. The "nexus" test should be applied to claims under the Act and *Richardson* should be reconsidered in light of this Court's recent decisions regarding admiralty jurisdiction.

ARGUMENT

I.

A FIRE WHICH SPREADS FROM A PLEASURE YACHT DAMAGING A NON-COMMERCIAL MARINA AND OTHER PLEASURE YACHTS DOES NOT PRESENT A SUFFICIENT NEXUS TO TRADITIONAL MARITIME ACTIVITY TO CONFER FEDERAL ADMIRALTY JURISDICTION

A. Federal Jurisdiction Is Limited To Occurrences On Navigable Waters Which Have A Nexus To Traditional Maritime Activities.

Judge Cudahy, writing for the Seventh Circuit, opened his opinion by acknowledging that "[h]ad this case arisen prior to 1972, it would have fallen within the admiralty jurisdiction." J.A. at 2a. This is true because, until this Court's decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), all federal courts applied the "locality" test which conferred admiralty jurisdiction to any tort occurring upon the high seas or navigable waters of the United States. *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866). This Court recognized the need to restrict federal jurisdiction in its decisions in *Executive Jet Aviation, Inc. v. City of Cleveland, supra*, and *Foremost Insuranc. Company v. Richardson*, 457 U.S. 668 (1982). In *Executive Jet*, this Court ruled that the locality of the occurrence, by itself, is an inadequate basis for assuming admiralty jurisdiction because modern life poses many instances of non-maritime torts occurring fortuitously upon navigable waters but over which the federal judiciary has no recognizable interest. Accordingly, this Court ruled that before admiralty jurisdiction could be invoked in tort cases, the district court must find both a maritime

"locality" and "a significant relationship to traditional maritime activity". *Executive Jet*, 409 U.S. at 268.

This Court explained the need to exclude certain actions from federal court based upon the federal interest in commerce and the modern proliferation of pleasure boats involved in non-commercial non-maritime torts. The locality test arose in an era when non-maritime torts occurring fortuitously upon the high seas were difficult to foresee or even imagine. *Executive Jet*, 409 U.S. at 254. This Court recognized that these non-commercial, non-maritime torts do not pose admiralty concerns which should be litigated in federal court. Accordingly, this Court restricted federal admiralty jurisdiction by requiring a nexus to traditional maritime activity and identifying commerce and navigation as the traditional maritime activities which give rise to federal admiralty jurisdiction. *Id.* at 255-56.

B. Commerce Is The Key Element Giving Rise To Federal Admiralty Jurisdiction.

Today, courts are confronted with torts occurring on navigable waters and aboard vessels which do not involve commerce or navigation, the two benchmarks of federal interest. The Seventh Circuit correctly ruled that such torts do not bear the requisite nexus to confer federal jurisdiction and should be left to state courts' jurisdiction. Petitioner would have this Court revert to a strict locality test, arguing that the Seventh Circuit's opinion places undue stress upon commerce as the key factor

giving rise to federal jurisdiction. In making this argument, Petitioner misses the proverbial boat. Commerce *is* the foundation for federal involvement in maritime and admiralty matters. The admiralty jurisdiction of the federal courts derived from the founding fathers' conviction that the nation needed a uniform body of laws, in general harmony with the laws of other maritime nations, for the conduct of the shipping business. *See, Foremost Insurance v. Richardson*, 457 U.S. at 680, n.3. (1981) (Powell, J., dissenting). Regulation of the shipping industry was closely related to the conduct of foreign affairs and the admiralty jurisdiction was created to serve commercial shipping interests. Stolz, *Pleasure Boating and Admiralty, Erie at Sea*, 51 Cal.L. Rev. 661 (1963); Gilmore and Black, *The Law of Admiralty* (2d Edition 1957), Chapter 1; 7A J. Moore, *Federal Practice*, Admiralty 325(5) (2d Ed. 1976). Professor Black, cited in the *Executive Jet* decision, pointed out that the mention of "admiralty and maritime jurisdiction" in Article III of the Constitution demonstrated "a strong federal interest in the orderly and uniform judicial governance of the concerns of the maritime industry." Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259, 262 (1950). *See also*, Gilmore & Black, *The Law of Admiralty* pp. 27-28 (2d Ed. 1957); Calamari, *The Wake of Executive Jet – A Major Wave Or a Minor Ripple*, IV The Maritime Lawyer 52 (1979).

"Admiralty is a specialized area of law that, since its ancient inception, has been concerned with the problems of seafaring commercial activity." *Foremost*, 457 U.S. at 679 (1982) (Powell J., dissenting). Commerce is the key element which provides the foundation for federal involvement: international commerce upon the high seas,

interstate commerce upon the inland waterways and a national interest in a competitive, vibrant marine transport and shipping industry. *In Re: Three Buoys Houseboats Vacation, U.S.A., Ltd.*, 878 F.2d. 1096, 1099 (8th Cir., 1989).

When this Court defined "navigable waters of the United States" over which federal courts could exercise admiralty jurisdiction, it identified the commercial foundation for the constitutional grant of federal admiralty jurisdiction:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.

The Daniel Ball, 77 U.S. 557, 563 (1870).

Petitioner grumbles that prior decisions, including the Seventh Circuit's *Sisson* decision, place too great weight upon commerce as a factor in determining federal admiralty jurisdiction. This argument rings hollow in light of the overwhelming and uncontroverted pronouncements of courts and commentators alike. Commerce is

the foundation upon which admiralty laws in every society, including our own, are erected and sustained. T. Etting, *The Admiralty Jurisdiction in America* 7-8 (1879), cited in *Foremost*, 457 U.S. at 678, n.2 (1981) (Powell, J., dissenting) Commerce, therefore, is the starting point in every analysis of the scope and reach of federal admiralty jurisdiction.

C. Traditional Maritime Activities Include Commerce And Navigation

Federal jurisdiction is extended to include navigation upon commercial waterways because of "the potential effect of non-commercial maritime activity on maritime commerce." *Foremost*, 457 U.S. at 675. Navigation is a maritime activity which may have a direct and potentially injurious impact upon maritime commerce. This Court explained the federal interest in navigation in its *Foremost* decision:

> The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasures boats on navigable waters has a significant relationship with maritime commerce.

Id., at 675. There must be uniform rules of navigation which apply to all vessels on our nation's waterways. Disparate "rules of the road" for pleasure boats and commercial vessels would likely result in collisions between them, seriously affecting maritime commerce. There is a legitimate federal interest in seeing that bodies of water susceptible to commerce are free from obstacles

that would impede maritime commerce. Therefore, while commercial activity is generally required to establish a significant relationship to traditional maritime activity, improper navigation may also support federal maritime jurisdiction.

However, in *Foremost*, this Court cautioned that "[n]ot every accident in navigable waters that might disrupt maritime commerce will support admiralty jurisdiction." *Id.*, at 675 n.5. Therefore, the Seventh Circuit evolved a test which is designed to identify the type of non-commercial maritime activity which justifies federal jurisdiction:

> In our view, a persuasive interpretation of *Foremost* would confine the admiralty jurisdiction in tort cases either to cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (i) has a potentially 'disruptive impact' on maritime commerce and (ii) involves the 'traditional maritime activity of navigation.'

Sisson, J.A. at 8a.

D. The Seventh Circuit Properly Limited Admiralty Jurisdiction In Tort Cases To Those Involving Commercial Maritime Activity Or To Those Involving Non-Commercial Activity In Which The Wrong Has A Potentially Disruptive Impact On Maritime Commerce And Involves Navigation.

New technologies and an expanded economy have placed a proliferation of pleasure craft upon the navigable waters. There are, therefore, more pleasure craft in navigation and also more non-commercial common-law

torts which happen to occur upon these pleasure craft. In order to strike the necessary balance between the legitimate federal interest in maritime commerce and the necessary exclusion from federal court of "garden variety" torts, this Court restricted federal admiralty jurisdiction to torts occurring upon navigable waters which also bear a significant relationship to traditional maritime activity. The challenge presented by this case is to define clearly the traditional maritime activities which will justify federal jurisdiction over tort actions. The Seventh Circuit's opinion does just that by focusing upon the dual concerns of navigation and commerce.

Ships other than commercial vessels were almost unheard of in the eighteenth and nineteenth centuries. *Foremost*, 457 U.S. at 680. (1981) (Powell, J., dissenting). Accordingly, non-maritime torts on non-commercial vessels were a rarity. According to the United States Bureau of Census, there were only 502 yachts and fishing boats registered in the United States in 1880,[1] and only 798 in 1890[2]. By 1926, there were 5,293 non-commercial vessels registered in the United States, but a large portion of those were fishing vessels[3]. By comparison, there were

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[1] Dept. of Interior, Report on the Agencies of Transportation in the United States (1880 Census), in a report titled: *History of Steam Navigation*, p. 692 (1883).

[2] Dept. of Interior, Report on Transporation Business in the United States at the Eleventh Census: 1890; Part II – Transportation by Water, p.14, Table 18 titled: Yachts – Number, Tonnage, and Valuation of Yachts and Pleasure Boats.

[3] United States Bureau of the Census, *Water Transportation* 1926, p.125 *et. seq*. The Bureau of the Census defined non-

(Continued on following page)

over 13 million pleasure boats in use in 1977[4], and almost 17 million in 1987[5]. The Seventh Circuit's test satisfies the federal need to control maritime commerce and all activities which might significantly impact maritime commerce while saving to the states jurisdiction over non-maritime torts which do not rise to the level of federal interest in commercial activity. The Seventh Circuit's opinion relieves the district courts from strictly analyzing the types of instrumentalities and accidents involved in each case while preserving flexibility by allowing the district courts to inquire whether the non-commercial activity would have a potentially disruptive impact on maritime commerce.

Petitioner urges this court to adopt an untried, and unreasonably rigid, test whereby any tort occurring on navigable waters and involving a vessel would confer admiralty jurisdiction. This test would involve the federal courts in the assumption of jurisdiction over ordinary tort

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commerical vessels for the purpose of the census statistics as all vessels which are not engaged directly or indirectly in the transporation of freight or passengers. Non-commercial vessels include fishing vessels, yachts and vessels engaged in miscellaneous services such as cable boats, dredges, pile drivers, inspection boats, patrol boats, fire boats, etc.

[4] Department of Transportation, National Transporation Statistics Annual Report, p.35 (1989).

[5] In 1987, there were almost 17 million recreational boats registered with the Coast Guard, showing a 2.4% increase from the prior year. Between 1977 and 1987, there was an average annual increase of 2.5% in the number of recreational pleasure boats in the United States. Department of Transporation, National Transportation Statistics Annual Report, p.35 (1989).

cases far beyond the original contemplation of admiralty jurisdiction in the Constitution and laws of the United States and would gut the "savings to suitors" clause contained in 28 U.S.C. 1333. *Foremost*, 457 U.S. at 685 (1981) (Powell, J., dissenting).

Recognizing the federal interest in maritime commerce, the Seventh Circuit's test permits non-commercial maritime torts to be litigated in the federal courts if the federal district court is convinced that the facts presented involve navigation which has a potentially disruptive impact upon maritime commerce and which requires the special federal expertise in admiralty. If navigation or any other non-commercial maritime activity has no potentially disruptive impact upon maritime commerce, there is no reason for the federal courts to apply admiralty laws.

The admiralty laws were specifically designed to protect and encourage commercial shipping. The weekend fisherman or water-skier has no interest in the traditional maritime laws involving general average, libel, maintenance and cure, limitation of liability, captures and prizes and laws concerning cargo. The weekend fisherman or water-skier is more familiar with the state tort laws which govern recoveries for negligent acts and which are properly in state courts or in federal courts pursuant to diversity jurisdiction. Why should a weekend fisherman or pleasure boat owner obtain the benefit of the Limitation of Liability Act contained in the admiralty laws when his negligence causes personal injury or property damage which has no potentially disruptive impact upon maritime commerce and which, under applicable state tort law, would subject him to unlimited legal liability? This

result is inappropriate in a court of equity such as the admiralty court, but this is precisely the result which the Petitioner seeks.

Petitioner urges this Court to apply admiralty jurisdiction and, by extension, admiralty laws to non-commercial non-maritime torts when the tort fortuitously occurs upon a vessel.[6] It is easy to see that such a rule would involve the federal judiciary in the resolution of "garden variety" tort cases, burdening the federal courts and frustrating the purposes of state tort law. There are many examples of "garden variety" tort claims which do not properly belong in federal court, but which would end up in admiralty under the Petitioner's suggested rule of law. A person who slips and falls on a negligently maintained carpeted ladder aboard a pleasure boat docked at a non-commercial marina would be enjoined from proceeding in state court and subject to federal maritime jurisdiction, including the Limitation of Liability Act, unless this Court affirms the Seventh Circuit's decision.[7] Two children using rowboats to net crawfish from a stream ancillary to the Mississippi River who collide and sink their

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[6] *Foremost*, 457 U.S. at 685 n.9 (1981) (Powell, J., dissenting), quoting from Swain, *Yes, Virginia, There is an Admiralty: The Rodriguez Case*, 16 Loyola L. Rev. 43 (1970): "[t]he term 'jurisdiction' denotes both the power of a court to hear and dispose of a certain controversy, and also the power to prescribe rules of decision to be applied by those courts considering the controversy. This is so because a court of admiralty sits solely to administer and apply the maritime law."

[7] *See, In The Matter of Foster J. Hepperly*, No. 89 1082-B (S.D.Cal.), *appeal docketed*, No. 90-55373 (9th Cir. Mar. 27, 1990).

boats would be subject to federal maritime jurisdiction.[8] Two people on jet skis who collide near an ocean beach filled with recreational sunbathers and pleasure boaters would be subject to limited liability and other inappropriate admiralty laws.[9] This does not make sense. Even two children on styrofoam rafts would be entitled to federal admiralty jurisdiction under Petitioner's proposed rule. Such a rule does not advance federal interests, but rather, violates the constitutional principle of federalism, denies states the right to regulate and adjudicate local tort actions and produces an inequitable result.

In Minnesota, the land of ten thousand lakes, the Mississippi River, a navigable waterway, grows very wide at certain points, forming what local residents call lakes, such as Lake Pepin, Spring Lake and Pigs Eye Lake. Of course, these are not lakes at all; they are wide portions of the Mississippi River. These "lakes" often have separate channels for barge and other commercial traffic and in the summertime, they are filled with recreational boats of all types, from houseboats to rowboats, yachts to windsurfing boards. There are often inland lakes only miles away which are also filled with recreational boaters. The Admiralty Court is a court of equity. Why should the boaters in Spring Lake (on the Mississippi River) be enjoined from pursuing their tort claims in state court, subject instead to admiralty laws which were drafted and

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[8] *See, Foremost*, 457 U.S. at 684 (1981) (Powell, J., dissenting).

[9] *See, In the Matter of the Complaint of Keys Jet Ski, Inc.*, 893 F.2d 1225 (11th Cir. 1990)

enacted to apply to commercial vessels, while their neighbors on White Bear Lake are free to pursue tort remedies in state court? Obviously, they should not. The Seventh Circuit's opinion, by distinguishing between non-maritime torts and torts involving navigation which have a potentially disruptive impact on maritime commerce, prevents this inequitable result while preserving the federal interest in regulating maritime commerce.

The Seventh Circuit's opinion requires that a non-commercial tort involve navigation as a prerequisite to federal admiralty jurisdiction. This is appropriate because navigation is the principal non-commercial activity which could seriously disrupt maritime commerce. According to the Coast Guard, there were 35 fatalities resulting from the loss of a U.S. vessel in 1987 and while 33 resulted from foundering or collision (involving navigation), only two resulted from fire.[10] Errors in navigation or operation account for the vast majority of problems encountered in maritime disasters and presents the most likely cause of problems affecting maritime commerce. In 1983, there were 7,344 vessels involved in accidents in the United States, of which 3,562 collided with another vessel, 661 collided with a fixed object, 182 collided with a floating object, 663 capsized, but only 63 (less than 1%) had fires or explosions involving something other than fuel.[11] Of

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[10] U.S. Department of Transporation, National Transporation Statistics, Annual Report, p.74 (1989).

[11] U.S. Department of Transportation, United States Coast Guard, *Boating Statistics*, p.19 (1983). There were also 344 fires or explosions involving fuel.

course, in this case, Sisson's yacht had a non-fuel fire at a washer/dryer unit and neither commerce nor navigation were involved. The Seventh Circuit's test requires navigation because this Court has, throughout this nation's history, recognized commerce and navigation as the two paramount federal interests in admiralty law. Furthermore, error or mishap in navigation or operation are the specters which can potentially disrupt maritime commerce.

The Seventh Circuit's two-prong test permits sufficient flexibility to evolve a case-specific precedent which focuses upon commerce without unduly restricting a federal district court from assuming federal jurisdiction when mandated. The test permits inquiry into the *potential* for disruption of maritime commerce, thus allowing federal jurisdiction even where maritime commerce was, fortuitously, not affected in the individual case but could be in future cases. Of course, in this case, there were no commercial vessels at the marina and this case clearly falls outside the purview of federal jurisdiction.

The Seventh Circuit did not adopt the "four-factor" test developed by the Fifth Circuit in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. den., Chicot Land Co., Inc. v. Kelly*, 416 U.S. 969 (1974). The four factors are:

1) Traditional concepts of the role of admiralty law;

2) the causation and nature of the injuries suffered;

3) the function and role of the parties; and

4) the types of vehicle and instrumentalities involved.

This test has been adopted by numerous circuits. *See* J.A., 8a, n.2.

The reasoning in *Sisson* is consistent with the use of these four factors and the two-prong *Sisson* test follows logically from a consideration of these factors. *In re: Complaint of American Auto, Inc.*, 1989 A.M.C. 1489, n.6 (N.D. Cal. 1989). Under *Sisson*, district courts have better guidance identifying the factors to be considered for admiralty jurisdiction. The causation, types of vehicles and instrumentalities must be commercial or must involve navigation. The function and role of the parties must establish a potentially disruptive impact upon maritime commerce. Traditional concepts of the role of admiralty law would apply to commercial vessels or non-commercial vessels involved in navigation if the occurrence potentially disrupts maritime commerce. Although the two approaches are consistent, Respondents urge this Court to adopt the *Sisson* two-prong analysis because it more clearly defines the factors to be considered while allowing adequate discretion to account for each particular case. Under either analysis, the district court's dismissal of *Sisson's* petition for exoneration or limitation of liability is proper.

E. This Supreme Court Has The Authority To Define The Scope Of Federal Admiralty Jurisdiction.

Article III, Section 2 of the United States Constitution provides that federal judicial power extends to all cases of admiralty and maritime jurisdiction. U.S. Const. art. III, §2. The federal statutes confer original jurisdiction to any civil case of admiralty or maritime matters, "saving

to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. §1333(1). We have already discussed the historical federal interest in maritime commerce and, by extension, in navigation. Throughout most of American history, claims involving maritime commerce or navigation would account for the vast majority of civil suits in admiralty.

There are no cases which distinguish between the constitutional grant of authority in these passages. Since their basic language is the same, we urge this Court to apply the *Sisson* test to federal admiralty jurisdiction, whether it arises under the Constitution or under federal statute.

F. The Seventh Circuit's Decision Is Consistent With Decisions Of This Court And Of Other Courts

The Seventh Circuit's decision is premised upon the clear, unambiguous language of this Court's decisions defining traditional maritime activity to be commerce or navigation. Other courts have recognized the same definition of traditional maritime activity. In *Whittington v. Sewer Construction Company*, 541 F.2d 427 (4th Cir. 1976), the court ruled that a shore-based injury inflicted by a winch and choker lacked a maritime nexus. In *Smith v. Knowles*, 642 F. Supp. 1137 (D.Md. 1986), there was no admiralty jurisdiction over a drowning incident off a pleasure boat which was not caused by any navigational error. In *Petrone v. U.S.*, 529 F. Supp. 295 (D.Md. 1981) admiralty jurisdiction was held not to exist because the

wrong complained of, a broken iron railing on a lighthouse, did not involve the maritime function of the lighthouse. In *Watson v. Massman Construction*, 850 F.2d 219 (5th Cir. 1988), a worker on a pier fell into the Mississippi River and drowned when he was hit by a compression hose attached to a boat. The Fifth Circuit affirmed dismissal for lack of admiralty jurisdiction because, considering the location, nature and manner of work, this case lacked the requisite maritime nexus for admiralty jurisdiction. In the recent case of *In The Matter of the Complaint of American Auto, Inc.*, 1989 A.M.C. 1489 (N.D. Cal. 1989), the district court dismissed the limitation proceeding of the owner of a boat which burned and sank in a Mexican harbor reserved for non-commercial vessels because it did not have a disruptive impact on commercial maritime activity and did not involve navigation. In *Lloyds of London v. Montauk Yacht Club*, 704 F. Supp. 1175 (E.D.N.Y. 1989), the court dismissed a claim for lack of admiralty jurisdiction where a fire started in a washer/dryer and destroyed a pleasure boat. In *Simone v. Genmar Industries, Inc.*, 1989 A.M.C. 2627 (S.D.N.Y. 1989), the court dismissed a claim against a boat manufacturer for tort and warranty liability for lack of subject matter jurisdiction, ruling that the boat, having been removed from the water, could not conceivably interfere with commercial shipping. In *Chi Shun Hua Steel v. Crest Tankers*, 708 F. Supp. 18 (D.N.M. 1989), the court dismissed a claim for lack of admiralty jurisdiction, ruling that the ship's flight to sea did not affect maritime service, commerce and navigation. The preceding cases all affirm the principle that absent maritime service, commerce and navigation, no admiralty jurisdiction exists.

II

THE LIMITATION OF LIABILITY ACT DOES NOT CONFER INDEPENDENT FEDERAL JURISDICTION

The Limitation of Liability Act, 46 U.S.C. §183-§189 (the "Act"), depends upon general admiralty jurisdiction, and a ship owner is not entitled to make claim under the Act unless he meets the "maritime nexus" test of *Executive Jet. Yacht Calibria* (In the Matter of the Complaint of Colquitt), 1975 A.M.C. 981 (D. Md. 1975); *Donily v. United States*, 381 F. Supp. 901 (D. Or. 1974). In the case of *In Re: Builder's Supply*, 278 F. Supp. 254 (N.D. Ia. 1968), the court dismissed the petition for limitation of liability, holding that the parameters of the Act and general admiralty law are the same, citing *Butler v. Boston and Savannah Steamship Co.*, 130 U.S. 527 (1889). *See also, Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989); *In Re: River Queen*, 275 F. Supp. 403 (D.Ark. 1967), *aff'd*, 402 F.2d 977 (8th Cir. 1978); *In Re: Stephens*, 341 F. Supp. 1404, 1407 (D. Ga. 1965); *In Re: Howser's Petition*, 227 F. Supp. 81 (W.D.N.C. 1964); *In Re: Madsen's Petition*, 187 F. Supp. 411 (N.D.N.Y. 1960).

Petitioner argues, without citation to any authority, that the Act provides an independent basis of federal jurisdiction. If the Petitioner's argument is accepted, any boat owner could limit his civil liability, whether or not the injury took place on navigable water, and whether or not the wrong involved a traditional maritime activity. This was not the intention of the drafters of the Act. *See, Benedict on Admiralty*, (6th Ed. 1986) §6. 1-42-43.

The United States Court of Appeals for the Eighth Circuit rejected the argument that the Act provides federal question jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1337 in the absence of admiralty jurisdiction. *In Re: Three Buoys Houseboats Vacation U.S.A.*, 878 F.2d 1096, 1100 (8th Cir. 1989). Citing Justice Holmes' precept that a "suit arises under the law that creates the cause of action" *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), the Eighth Circuit concluded that the Act is "more akin to a defense" and that "[a] defense that raises a federal question is inadequate to confer federal jurisdiction. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (quoting *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983))." *Id.* at 1100. The Eighth Circuit concluded that the Act's territorial application is coextensive with the territorial reach of admiralty jurisdiction and, therefore, jurisdiction is likewise coextensive. *Id.* at 1101.

In *Butler v. Boston and Savannah Steamship Co.*, 130 U.S. 527 (1889), this Court held that the law of limited liability of ship owners is co-extensive in its operation with the general admiralty and maritime jurisdiction. *Id.* at 557. This rule of law, which has never been successfully challenged, is fair, equitable and consistent with Congressional intent. The Act was adopted for the sole purpose of promoting maritime commerce.[12] The purpose of the Act

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[12] For judicial reviews of the history of the limitation principle, see Judge Ware's opinion in *The Rebecca*, 20 Fed.Cas. 373, Case No. 11.619 (D.Me. 1813); Justice Bradley in *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1871); Justice Brown in *The Main v. Williams*, 152 U.S. 122 (1804).

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was to put American shipowning interests on a competitive equality with British interests and to promote an American maritime industry. In 1872, the Supreme Court supplemented the Act by rules of court. 80 U.S. (13 Wall.) xii-xiv. (1872). This Court explained its power to make rules on the basis that the subject was "one pre-eminently of admiralty jurisdiction." *Providence & New York S.S. Co. v. Hill Manuf. Co.*, 109 U.S. 578, 593-94 (1883). Commenting on the purposes and effects of the 1948 amendments to those rules, one federal court held that the rules are not "jurisdictional"; so that a trial court in its discretion

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The Act was principally taken from the English Act of 26 Geo. 3.c.86 (1786) and from the Revised Statute of Maine, 1840, c.47.

Senator Hamlin of Maine, Chairman of the Senate Committee on Commerce, who introduced the Bills, presented it as merely an adoption of English legislation: "Why not give to those who navigate the ocean as many inducements to do so as England has done? . . . That is what this bill seeks to do, and it asks no more." Of the heart of the bill, sections three and four, he said: "These two sections are substantially the English law." Sen. Rantoul of Massachusetts was willing to give even greater assurance: "They (the British) have made the alteration which we are now asked to make, and they have carried it further than this section of the bill carries it." Sen. Davis, from the same state, said: "It is simply placing our mercantile marine upon the same footing as that of Great Britian." 23 Cong.Globe 331-332, 713-720, 776-77, 31st Cong. 2d Sess. (Jan. 25, Feb. 26, March 3, 1851).

The Act was passed following a case in which American shipowners had been subjected to what was thought to be an unduly heavy burden of liability – a liability to which their competitors in other shipowning countries, notably England, were not subject. *New Jersey Steam Navigation Co. v. Merchants' Bank* (The Lexington), 47 U.S. (6 How.) 344 (1848).

may waive, overlook or ignore non-compliance. *The Nordic* (Petition of Canada S.S. Lines), 93 F. Supp. 549 (N.D. Ohio 1950). In all of the amendments to the Act and to the rules, neither Congress nor this Court ever expressly identified a separate basis of federal jurisdiction.

Numerous courts and commentators have written derisively about the Act. Gilmore and Black wrote: "The Limitation Act, originally passed to afford a measure of relief to a hard-pressed and highly competitive industry, has become a charter of irresponsibility for a few wealthy individuals." Gilmore & Black, *The Law of Admiralty*, §10-23 at 700 (1957).

The purpose for which the Act was passed is no longer compelling in an age of corporate ownership and liability insurance. Judge Seals collected considerable literature, judicial and academic, deploring the perversion of the original purpose of the Act in modern society in *Petition of Porter (The Yacht Julaine)*, 272 F. Supp. 282 (S.D. Tex. 1967).

Applying federal jurisdiction pursuant to the Act in the absence of general admiralty jurisdiction would contort the purpose and intent of the Act. It would permit limitation of liability in non-navigable waters, to non-maritime torts and, in short, would pre-empt and supplement state tort law whenever a tort occurs in a vessel. This was not the intent of the Act and is not an appropriate rule of law in our society.

One commentator called the Act an "[a]n act which is vicious in its impact, unconscionable in its result, and outmoded in an age of institutionalized protective insurance, [which] if it cannot be repealed outright, deserves

only a narrow, grudging and constrictive construction." Comment, 24 Nacca L.J. 223, 225 (1959). Justice Black, speaking for four members of a court divided 4-4-1, wrote:

> Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons.

Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954) (dissenting opinion).

By applying the "nexus" requirement to suits brought under the Act, this Court would restrict its application to those cases which evidence a significant relationship to traditional maritime activity. Limited liability would not be available to "garden variety" tortfeasors who are not involved in traditional maritime activities. Until Congress acts to repeal or amend the Act, this Court's power to constrict its application lies in the power to define admiralty jurisdiction. This Court should exercise that prerogative in this case and declare that actions under the Limitation of Liability Act are subject to the enumerated requirements of general admiralty jurisdiction, including the "nexus" requirement as it is defined in *Sisson*.

III.

THIS COURT'S DECISION IN *RICHARDSON V. HARMON* SHOULD BE RECONSIDERED

Petitioner argues that this Court's decision in *Richardson v. Harmon*, 222 U.S. 96 (1911) stands for

the broad proposition that the Limitation of Liability Act, 46 U.S.C. §183-§189 expands federal jurisdiction beyond the confines of traditional admiralty jurisdiction and authorizes federal judicial involvement in cases not otherwise cognizable in admiralty court. Respondents believe that the *Richardson* decision may be understood to hold that federal admiralty jurisdiction includes maritime torts which cause non-maritime damage, extending federal law only where admiralty jurisdiction already exists. *Richardson* should be reconsidered in either case. If this Court reads *Richardson* as expanding federal jurisdiction, then the rule must be reconsidered in light of the significantly changed circumstances in today's society. On the other hand, if this Court reads *Richardson* as merely expanding the scope of the Act, then the case should be deemed to have no precedential value because this rule was codified in The Extension of Admiralty Act, 46 U.S.C. §740.

Petitioner argues that §189 of the Limitation of Liability Act expanded the scope of federal admiralty jurisdiction and asks this Court to construe the *Richardson* decision to hold that federal admiralty jurisdiction and jurisdiction under the Act are two separate "species" of federal jurisdiction. Accordingly, Petitioner argues that the *Executive Jet* nexus requirement does not apply to the Limitation Act "species" of federal jurisdiction, only to the general admiralty "species" of federal jurisdiction.

Of course, Petitioner again offers no citation to support this novel argument. The argument is fallacious when considered in light of the purpose of adding the "nexus" requirement: modern changes in society limiting the instances when admiralty expertise is necessary in

tort cases and concern for states' rights to adjudicate non-maritime tort claims. Statutes which expand or restrict federal jurisdiction are clear and unambiguous in their intent. Section 189 of the Limitation of Liability Act says nothing about federal admiralty jurisdiction.

Richardson v. Harmon involved a collision between a barge operating on navigable waters and a bridge. This court characterized the collision as a "non-maritime tort", but actually treated it as a maritime tort causing damage to a non-maritime structure. In fact, the *Richardson* court defined "non-maritime" tort as "due to a collision between the ship and a structure upon land . . . ". *Id.* at 106. Focusing upon the title and intent of the then recent amendment to the Limitation of Liability Act[13], the court extended the Act to non-maritime damage caused by a vessel in navigable waters. The intent of the amendment was identified by the *Richardson* court as follows:

> The avowed purpose of the original act was to encourage American investment in ships. This was accomplished by confining the owner's individual liability, when not the result of his own fault, in the instances enumerated, to his share in the ship. The same public policy is declared to be the motive of the act of which this section is a part.

Id. at 103. The court rejected the argument that the amendment was restricted to contract liability and instead, *inferred* that the policy of the Government was to

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[13] The act of June 26, 1884, 23 Stat. 57, initially called §18 of the Omnibus Shipping Act of 1884 is now codified at 46 U.S.C. §189.

confine the risk of an owner not personally at fault to his interest in the ship. Accordingly, the court ruled:

> We therefore conclude that the section in question was intended to add to the enumerated claims of the old law 'any and all debts and liabilities' not theretofore included.

Id. at 105.

Nowhere does this law or this decision identify or create a separate and independent basis of federal maritime jurisdiction. On the contrary, the *Richardson* court's holding is simply that §189 adds to the "old law." Thus, in *Richardson*, this Court construed §189 of the Act to apply to non-maritime torts, which it defined as a collision between a vessel in navigable waters and a structure upon land.

Respondent believes that the *Richardson* court's use of the term "non-maritime" denoted damage to a non-maritime structure. Petitioner would apply the term to any tort which does not meet the requisite criteria for federal admiralty jurisdiction. Such a leap is not justified. Construed as expanding the scope of limitation to include damage to non-maritime structures, the rule of law enunciated in *Richardson v. Harmon* was codified in 1948 in the Extension of Admiralty Act, 46 U.S.C. §740.

The Extension of Admiralty Act, 46 U.S.C. §740 (1982) extends admiralty jurisdiction to all cases of damage or injury caused by a vessel on navigable waters. This is precisely the result obtained in *Richardson* and accordingly, the *Richardson* holding has no precedential value.

Additionally, courts construing the Extension of Admiralty Act have ruled that actions arising thereunder

must meet the requisite elements of general admiralty jurisdiction because the Extension of Admiralty Act does not confer an independent basis of federal jurisdiction. *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing*, 644 F.2d 1132 (5th Cir. 1982), *cert. den. sub. nom., Valero Energy Corp. v. Sohyde Drilling & Workover, Inc.*, 454 U.S. 1081 (1981); *Yacht Mlanje, Lim. Procs.*, 709 F. Supp. 1123 (S.D. Fla. 1989). These courts reasoned that the Extension of Admiralty Act merely expanded existing law to encompass harm done or consummated on land and is, therefore, subject to the "nexus" requirement outlined in *Executive Jet*. Similarly, even if *Richardson* is construed to establish an independent basis for admiralty jurisdiction, it too is subject to the "nexus" requirement outlined in *Executive Jet*.

In *Lewis Charters v. Huckins Yacht*, 871 F.2d 1046 (11th Cir. 1989), the Eleventh Circuit ruled that a claim which does not bear a significant relationship to traditional maritime activity is not otherwise cognizable in admiralty court under the Limitation of Liability Act. Responding to the argument that *Richardson* permitted an independent basis of admiralty jurisdiction under the Limitation of Liability Act, the Eleventh Circuit noted that "*Richardson* was decided before the Supreme Court explicitly included a nexus requirement in the test for admiralty jurisdiction . . . " *Lewis Charters*, 871 F.2d at 1052. Focusing upon the *Richardson* court's reliance on congressional intent, the Eleventh Circuit concluded that "[t]he reasons for the Supreme Court's liberal construction in 1911 no longer exist today." *Id.* at 1053. Therefore, the court reasoned, "appellant may not base admiralty jurisdiction solely upon the Limitation Act, in the absence of a significant relationship between its claim and traditional notions of

maritime activity." *Id.* at 1054. Since the fire which started in the washer/dryer unit aboard Petitioner's yacht does not bear a significant relationship to traditional maritime activities, Petitioner's claim lacks admiralty jurisdiction, even if premised upon the Limitation of Liability Act.

Finally, if *Richardson* is interpreted as developing a separate, distinct "species" of federal admiralty jurisdiction, then it should be reconsidered in light of the changes in our society since 1911. Congress enacted the Act to encourage investment in the shipping industry in the United States and prevent investment capital from being diverted to England. Petitioner argues that the same policy applies today. This is nonsense. With millions of pleasure craft on all of the various bodies of water in this country, manufacturers of pleasure boats are neither encouraged nor discouraged by this Act. Indeed, how can a manufacturer of boats know in advance whether his product will be used on navigable or non-navigable waters? There is no improvement in this nation's boat manufacturing capacity due to the Limitation of Liability Act and no public policy supporting its application beyond traditional maritime activities.

Expanding the protection afforded under the Act to include non-maritime, non-commercial torts serves no purpose and accomplishes nothing but injustice. Many district courts have simply refused to apply the Act to pleasure craft. *Baldassano v. Larsen*, 580 F. Supp. 415 (D.Minn. 1984); *Complaint of Tracey*, 608 F. Supp. 263 (D.Minn. 1985); *Matter of Lowing*, 635 F. Supp. 520 (W.D. Mich. 1986). We merely recommend that this Court declare that jurisdiction under the Act is co-extensive with general admiralty jurisdiction.

CONCLUSION

Respondent respectfully requests that this Court affirm the Seventh Circuit's decision in *In Re: Sisson*, which dismissed Sisson's suit for lack of subject matter jurisdiction. Respondent requests that this Court find that jurisdiction under the Limitation of Liability Act is co-extensive with general admiralty jurisdiction and, therefore, subject to the *Executive Jet* "nexus" test, as further defined in *Sisson*. Respondent further requests that this Court reconsider its decision in *Richardson v. Harmon*, restricting its application to instances of maritime torts damaging non-maritime structures or, in the alternative, declaring that the *Richardson* case is outdated and must be amended in light of our society's proliferation of pleasure craft involved in "garden variety" tort claims which are not properly brought in federal court under the Limitation of Liability Act.

Respectfully submitted,

Of Counsel:

JEFFREY S. HERDEN
LANDAU, OMAHANA & KOPKA
8420 W. Bryn Mawr Avenue
Suite 1030
Chicago, Illinois 60631
(312) 380-8800

ROBERT J. KOPKA
LANDAU, OMAHANA & KOPKA
8420 W. Bryn Mawr Avenue
Suite 1030
Chicago, Illinois 60631
(312) 380-8800

Attorneys for Respondent